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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

JIAN MING ZHONG and CHEN ZHONG, Plaintiffs, v. UNITED STATES DEPARTMENT OF STATE, et al., Defendants.	No. C 08-2871 WHA NOTICE OF MOTION TO DISMISS/FOR SUMMARY JUDGMENT Date: October 9, 2008 Time: 8:00 a.m. Ctrm: 9, 19th Floor

PLEASE TAKE NOTICE THAT on October 9, 2008, at 8:00 a.m., before the Honorable William H. Alsup, 450 Golden Gate Avenue, San Francisco, California, 94102, Defendants United States Department of State, et al., by their attorneys, Joseph P. Russoniello, United States Attorney for the Northern District of California, and Melanie L. Proctor, Assistant U.S. Attorney, will move this Court for an order dismissing the complaint for lack of subject matter jurisdiction and improper venue, pursuant to Fed. R. Civ. P. 12(b)(1) and (3). Alternatively, Defendants move the Court for an order granting summary judgment in their favor, pursuant to Fed. R. Civ. P. 56(c).

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Defendant's Motion is based on this notice, the points and authorities in support of this motion, the pleadings on file in this matter, the Declarations of Genize Walker, Chloe Dybdahl, and Melanie Proctor, and on such oral argument as the Court may permit.

Dated: August 14, 2008

Respectfully submitted,

JOSEPH P. RUSSONIELLO
United States Attorney

/s/
MELANIE L. PROCTOR
Assistant United States Attorney
Attorneys for Defendants

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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

JIAN MING ZHONG and CHEN ZHONG, Plaintiffs, v. UNITED STATES DEPARTMENT OF STATE, et al., Defendants.	No. C 08-2871 WHA MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS OR FOR SUMMARY JUDGMENT Date: October 9, 2008 Time: 8:00 a.m. Ctrm: 9, 19th Floor

I. RELIEF SOUGHT

Defendants seek an order dismissing this action for lack of subject matter jurisdiction and improper venue, pursuant to Fed. R. Civ. P. 12(b)(1) and (3). Contrary to Plaintiffs' assertions, the visa was properly refused on December 19, 2007. Under the longstanding doctrine of consular nonreviewability, the Court lacks subject matter jurisdiction. In addition, aliens may not base venue upon their residence. Alternatively, Defendants seek an order granting summary judgment in their favor because the visa was properly refused.

II. ISSUES PRESENTED

Whether the Complaint should be dismissed for lack of subject matter jurisdiction.

Whether the Complaint should be dismissed for improper venue.

Whether summary judgment should be granted in Defendants' favor.

III. FACTS

On May 19, 2002, Hwang's Food Inc. filed a petition for an alien worker on behalf of Jianming Zhong ("Plaintiff Zhong") with the former Immigration and Naturalization Service ("INS"), now United States Citizenship and Immigration Services ("USCIS").[1] Declaration of Genize Walker ("Walker Decl."), p. 1 ¶ 4. The former INS approved the petition on October 25, 2002, under the employment third preference visa category. Id. His visa was immediately available on this date. U.S. Dept. of State Visa Bulletin, Vol. VIII, No. 50 (Oct. 2002).[2] On December 23, 2002, based on this approved visa petition, Plaintiff Zhong applied to adjust his status. Walker Decl., p. 1 ¶ 5. On April 26, 2005, Plaintiff Zhong adjusted his status to lawful permanent resident, with a priority date of April 12, 2001. Id.

On June 28, 2005, Plaintiff Zhong filed Form I-824, a petition for action on an approved application or petition with USCIS, to request that USCIS notify the consulate that his spouse and daughter could join him in the United States. Id., p. 1 ¶ 6. USCIS approved the application on August 30, 2005. Id. USCIS notified the United States consulate of the approval on September 7, 2005, by faxing copies of the I-824 and approved adjustment of status application. Id. Plaintiff's daughter reached the age of twenty-one on April 29, 2006. Complaint, p. 7 ¶ 19.

On December 17, 2007, Plaintiff's spouse and daughter, Yuqing Wang and Chen Zhong, applied for immigrant visas. Declaration of Chloe Dybdahl ("Dybdahl Decl."), p. 2 ¶ 4. On December 19, 2007, a consular officer issued a visa to Yuqing Wang. Id. However, the consular officer refused the immigrant visa application of Ms. Zhong because she was over the age of twenty-one, and had not sought immigrant status within one year of the visa becoming available

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[1]On March 1, 2003, the Department of Homeland Security and its United States Citizenship and Immigration Services assumed responsibility for adjudication of applications for immigration benefits, such as adjustment of status. 6 U.S.C. § 271(b). Accordingly, the discretion formerly vested in the Attorney General is now vested in the Secretary of Homeland Security. 6 U.S.C. § 551(d).

[2]Visa bulletins are available on the Department of State's website; however, for the convenience of the Court, a copy of the bulletin is attached to the Declaration of Melanie Proctor ("Proctor Decl.") as Exh. A.

to Plaintiff Zhong.

IV. LEGAL BACKGROUND

A. LEGAL STANDARD

1. Rule 12(b)(1) Motions

A motion to dismiss under Rule 12(b)(1) tests the subject matter jurisdiction of the court. See e.g., Savage v. Glendale Union High School, 343 F.3d 1036, 1039-40 (9th Cir. 2003), cert. denied, 541 U.S. 1009 (2004). A motion will be granted if the complaint, when considered in its entirety, on its face fails to allege facts sufficient to establish subject matter jurisdiction. Id. at 1039 n.2. "When a defendant moves to dismiss a complaint for lack of subject matter jurisdiction pursuant to Fed. R. Civ. P. 12(b)(1), the plaintiff bears the burden of proving that the court has jurisdiction to decide the claim." R.K., ex rel. T.K. v. Hayward United School Dist., No. C 06-7836 JSW, 2007 WL 2778702, at *4 (N.D. Cal. Sept. 21, 2007), citing Thornhill Publ'n Co. v. General Tel. & Elecs. Corp., 594 F.2d 730, 733 (9th Cir. 1979).

A motion to dismiss for lack of subject matter jurisdiction may take two forms: facial or factual. R.K., 2007 WL 2778702, at *4, citing Safe Air for Everyone v. Meyer, 373 F.3d 1035, 1039 (9th Cir. 2004). When the jurisdictional attack is "facial," the Court accepts the factual allegations of the complaint as true, and construes those facts in the light most favorable to the non-moving party. R.K., 2007 WL 2778702, at *4. If the attack is "factual," the Court may consider "affidavits or other evidence that would be properly before the Court, and the non-moving party is not entitled to any presumptions of truthfulness with respect to the allegations in the complaint." Id. Here, because Defendants dispute Plaintiffs' allegations that they complied with the applicable statutes and regulations, and whether the visa was refused, the jurisdictional attack is factual, and the Court may consider the submitted declarations. Land v. Dollar, 330 U.S. 731, 735 n. 4 (1947); Biotics Research Corp. v. Heckler, 710 F.2d 1375, 1379 (9th Cir. 1983).

2. Summary Judgment

Summary judgment is appropriate when the "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter

of law." Fed. R. Civ. P. 56(c). An issue is "genuine" only if there is sufficient evidence for a reasonable fact finder to find for the non-moving party. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248-49 (1986). A fact is "material" if the fact may affect the outcome of the case. See id. at 248. The Ninth Circuit has declared that "[i]n considering a motion for summary judgment, the court may not weigh the evidence or make credibility determinations, and is required to draw all inferences in a light most favorable to the non-moving party." Freeman v. Arpaio, 125 F.3d 732, 735 (9th Cir. 1997). A principal purpose of the summary judgment procedure is to identify and dispose of factually unsupported claims. See Celotex Corp. v. Cattrett, 477 U.S. 317, 323-24 (1986).

B. JURISDICTION UNDER THE MANDAMUS ACT, THE ADMINISTRATIVE PROCEDURE ACT, AND THE DECLARATORY JUDGMENT ACT

Under the Mandamus Act, a court may compel performance of "a duty owed to the plaintiff." 28 U.S.C. § 1361. Further, "[m]andamus writs, as extraordinary remedies, are appropriate only when a federal officer, employee, or agency owes a nondiscretionary duty to the plaintiff that is 'so plainly prescribed as to be free from doubt.'" Stang v. IRS, 788 F.2d 564 (9th Cir. 1986), quoting Nova Stylings, Inc. v. Ladd, 695 F.2d 1179, 1180 (9th Cir. 1983). The United States Supreme Court has stated that "[t]he common law writ of mandamus is intended to provide a remedy for a plaintiff only if . . . the defendant owes him a clear nondiscretionary duty." Heckler v. Ringer, 466 U.S. 602, 616 (1984). The Ninth Circuit has explained that

> [m]andamus . . . is available to compel a federal official to perform a duty only if: (1) the individual's claim is clear and certain; (2) the official's duty is nondiscretionary, ministerial, and so plainly prescribed as to be free from doubt, and (3) no other adequate remedy is available.

Kildare v. Saenz, 325 F.3d 1078, 1084 (9th Cir. 2003). Mandamus is an extraordinary remedy. See Cheney v. U.S. Dist. Ct. for the District of Columbia, 542 U.S. 367, 392 (2004) (Stevens, J., concurring); Allied Chemical Corp. v. Daiflon, Inc., 449 U.S. 33, 34 (1980).

The Administrative Procedure Act ("APA"), 5 U.S.C. § 701 et seq., does not provide an independent jurisdictional basis. Califano v. Sanders, 430 U.S. 99, 107 (1977); Staacke v. U.S. Department of Labor, 841 F.2d 278, 282 (9th Cir. 1988). Rather, it merely provides the standards for reviewing agency action once jurisdiction is otherwise established. Staacke, 841 F.2d at 282.

The Court has jurisdiction over Plaintiff's APA claim "only if §§ 702 and 706(1) of the APA, in conjunction with the federal question statute, 28 U.S.C. § 1331, provide jurisdiction." Alzuraiki v. Heinauer, No. 07CV 3189, 2008 WL 413861, at *2 (D. Neb. Feb. 13, 2008). Under the APA, a court may compel an administrative agency to perform an action that has been "unlawfully withheld" or "unreasonably delayed" by that agency. 5 U.S.C. § 706(1). A court cannot compel an agency to take an action it is not lawfully required to take. Norton v. So. Utah Wilderness Alliance, 542 U.S. 55, 63 (2004). Finally, the Declaratory Judgment Act ("DJA"), 28 U.S.C. § 2201, does not provide an independent basis for jurisdiction; rather, it only expands the range of remedies available in federal courts. Skelly Oil Co. v. Phillips Petroleum Co., 339 U.S. 667, 671-72 (1950).

C. EMPLOYMENT BASED VISAS AND FOLLOWING TO JOIN BENEFITS

Congress has placed numerical limitations on employment based visas. 8 U.S.C. § 1151(d). The Department of State ("State Department") coordinates with USCIS to manage the individual allotment of employment-based visas. Ptaskinska v. U.S. Dept. of State, No. 07 C 3795, 2007 WL 3241560, at *1 (N.D. Ill. Nov. 1, 2007). The State Department issues a monthly visa bulletin

> estimating the number of anticipated visas that will be issued during any quarter of the fiscal year . . . . The priority date is the date on which USCIS receives and accepts for filing the alien's labor certification in cases for which a labor certification is required before an employer may file Form I-140, which is an Immigration Petition for an Alien Worker.

Id.; 8 C.F.R. § 204.5(d).

Children of employment-based immigrants, who are not otherwise entitled to immigrant status, shall be entitled to the same status, and in the same order of consideration, if accompanying or following to join, the parent. 8 U.S.C. § 1153(d). An approved employment-based adjustment applicant may file Form I-824 to request USCIS to notify the United States consulate that his status has been adjusted, allowing his spouse and/or children to apply for an immigrant visa. Complaint, Exh. I. Children are defined in the Immigration and Nationality Act, 8 U.S.C. § 1101 et seq., as "an unmarried person under twenty-one years of age."[3] 8 U.S.C. § 1101(b)(1).

Congress passed the Child Status Protection Act ("CSPA"), Pub. L. No. 107-208, 116 Stat.

[3]The definition is not all-inclusive, and includes only certain categories not relevant here. 8 U.S.C. § 1101(b)(1).

927, §§ 2, 3 (Aug. 6, 2002), codified at 8 U.S.C. §§ 1151, 1153, to provide age-out protection for aliens who were children at the time a petition for permanent resident status was filed on their behalf. Ochoa-Amaya v. Gonzales, 479 F.3d 989, 992 (9th Cir. 2007). As it applies to the case at hand, CSPA provides that

> (h) Rules for determining whether certain aliens are children
>
> (1) In general
>
> For purposes of subsections (a)(2)(A) and (d) of this section, a determination of whether an alien satisfies the age requirement in the matter preceding subparagraph (A) of section 1101(b)(1) of this title shall be made using–
>
> (A) the age of the alien on the date on which an immigrant visa number becomes available for such alien (or, in the case of subsection (d) of this section, the date on which an immigrant visa number became available for the alien's parent), but only if the alien has sought to acquire the status of an alien lawfully admitted for permanent residence within one year of such availability; reduced by
>
> (B) the number of days in the period during which the applicable petition described in paragraph (2) was pending.

8 U.S.C. § 1153(h)(1) (emphasis added). Thus, for alien children who seek to follow to join their parents, CSPA applies only to those applicants who apply for adjustment within one year of the date the parent's visa became available. Id.

If the consular officer determines that the alien is ineligible for a visa, no visa will be issued. 8 U.S.C. § 1201(g). The applicant bears the burden of proof to establish eligibility for a visa. 8 U.S.C. § 1361. A visa may be refused only upon a ground specifically set out in the law or implementing regulations. 22 C.F.R. § 40.6. Notably, only consular officers have the power to issue visas. 8 U.S.C. §§ 1101(a)(9), (16); 1201(a); Patel v. Reno, 134 F.3d 929, 933 (9th Cir. 1997).

V. ANALYSIS

A. THE COMPLAINT SHOULD BE DISMISSED FOR LACK OF SUBJECT MATTER JURISDICTION

1. The Doctrine of Consular Nonreviewability Precludes Plaintiffs' Claims

Courts have long held that in foreign affairs matters, "judicial intervention has been restricted to those matters the review of which has been 'authorized by treaty or statute, or is required by the paramount law of the Constitution.'" Ventura-Escamilla v. INS, 647 F.2d 28, 30 (9th Cir. 1981),

quoting Hampton v. Mow Sun Wong, 426 U.S. 88, 101 n. 21 (1976). Moreover, the decision of a consular officer to grant or deny a visa is not subject to court review. Centeno v. Schultz, 817 F.2d 1212, 1214 (5th Cir. 1987), cert. denied, 484 U.S. 1005 (1988); Li Hing of Hong Kong, Inc. v. Levin, 800 F.2d 970, 971 (9th Cir. 1986); Ventura-Escamilla, 647 F.2d at 30; United States ex rel. Ulrich v. Kellogg, 30 F.2d 984, 986 (D.C. Cir. 1929), cert. denied, 279 U.S. 868 (1929). This well settled doctrine is supported by United States Supreme Court precedent, the legislative history of the Immigration and Nationality Act, and the terms of the statute itself. See Lem Moon Sing v. United States, 158 U.S. 538, 547 (1895) ("The power of Congress to exclude aliens altogether from the United States, or to prescribe the terms and conditions upon which they may come into this country, and to have its declared policy in that regard enforced exclusively through executive officers, without judicial intervention, is settled by our previous adjudication.").

The Ninth Circuit has noted that "[t]he Supreme Court has repeatedly affirmed that the legislative power of Congress over the admission of aliens is virtually complete." Ventura-Escamilla, 647 F.2d at 30, citing Fiallo v. Bell, 430 U.S. 787, 792 (1977), and Kleindienst v. Mandel, 408 U.S. 753, 766 (1972). Here, the consular officer refused to issue a visa. Dybdahl Declaration, p. 2 ¶ 4. That decision is not subject to judicial review. 8 U.S.C. § 1201(g); 22 C.F.R. § 42.81(a); see also Svensborn v. Keisler, No. C07-5003 TEH, 2007 WL 3342751, at *4 (N.D. Cal. Nov. 7, 2007) (discussing § 1201(g) refusals). Indeed, Congress specifically considered and rejected the suggestion that the consular officer's decision be administratively or judicially reviewable:

> Consular decisions– Although many suggestions were made to the committee with a view toward creating in the Department of State a semijudicial board, similar to the Board of Immigration Appeals, with jurisdiction to review consular decisions pertaining to the granting or refusal of visas, the committee does not feel that such body should be created by legislative enactment, nor that the power, duties and functions conferred upon Consular officers by the instant bill should be made subject to review by the Secretary of State.

Ventura-Escamilla, 647 F.2d at 30-31, quoting H. Rep. No. 1365, 82d Cong., 2d Sess., 1952 U.S.C.C.A.N. 1653, 1688 (emphasis added).

Cases decided under this doctrine make it clear that the Court has no jurisdiction to consider requests for review of consular visa decisions, and that Plaintiffs' request for relief is deficient as a matter of law. See, e.g., Perales v. Casillas, 903 F.2d 1043, 1046 (5th Cir. 1990) (stating in dicta

that"[t]he consular decision on visa application is totally immune from review"); Ventura-Escamilla, 647 F.2d at 30 (holding that court had no jurisdiction to review consul's decision to deny immigrant visa application); Rivera de Gomez v. Kissinger, 534 F.2d 518, 519 (2d Cir. 1976) (same); Garcia v. Baker, 765 F. Supp. 426, 427 (N.D. Ill. 1990) (finding court lacked jurisdiction to review refusal of immigrant visa based on exclusion ground); Hermina Sague v. United States, 416 F. Supp. 217, 219 (D.P.R. 1976). As the district court noted in Romero v. Consulate of United States, Barrangquilla, 860 F. Supp. 319, 322 (E.D. Va. 1994), "the doctrine of consular nonreviewability is essentially without exception." Thus, a consular officer's visa determination is not subject to review, even if:

– the officer allegedly failed to follow Department regulations, Burrafato v. Department of State, 523 F.2d 554 (2d Cir. 1975), cert. denied, 424 U.S. 910 (1976);

– the applicant challenges the validity of the regulations on which the decision was based, Ventura-Escamilla, 647 F.2d at 31;

– the decision was alleged to have been based on a factual or legal error or was contrary to the law, Centeno, 817 F.2d 1212, 1213 (5th Cir. 1987); Loza-Bedoya v. INS, 410 F.2d 343 (9th Cir. 1969); Grullon v. Kissinger, 417 F. Supp. 337 (E.D.N.Y. 1976), aff'd without op., 559 F.2d 1203 (2d Cir. 1977);

– the applicant claims the decision is reviewable under the APA, Romero, 860 F. Supp. 319, 324 (E.D. Va. 1994), citing Haitian Refugee Center v. Baker, 953 F.2d 1498, 1507 (11th Cir.), cert. denied, 502 U.S. 1122 (1992); or

– the applicant challenges the reasonableness of the determination, United States. ex rel. London v. Phelps, 22 F.2d 288, 290 (2d Cir 1927), cert. denied, 276 U.S. 630 (1928); Hermina, 416 F. Supp. at 220-21.

Generally, the APA "waives sovereign immunity for suits against federal officers in which the plaintiff seeks nonmonetary relief." Skranak v. Castenada, 425 F.3d 1213, 1218 (9th Cir. 2005), quoting Metro. Water Dist. of S. California v. United States, 830 F.2d 139, 143 (9th Cir. 1987). However, the doctrine of consular nonreviewability precludes review under the APA. Bruno v. Albright, 197 F.3d 1153, 1157-59 (D.C. Cir. 1999). The APA contains two "notable qualifications"

to the presumption of judicial review: "The validity of agency action may not be tested in court if 'statutes preclude judicial review' or if 'agency action is committed to agency discretion by law.'" Id. at 1157, quoting 5 U.S.C. § 701(a)(1)-(2). Moreover,

> . . . § 702 itself contains another qualifying clause. It provides that "Nothing herein"–which includes the portion of § 702 from which the presumption of reviewability is derived–" affects other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground," 5 U.S.C. § 702(1). The House Report accompanying this amendment described these "other limitations" as including "express or implied preclusion of judicial review." H.R. Rep. No. 94-1656, at 12 (1976).

Bruno, 197 F.3d at 1158. The appellate court further noted,

> The Administrative Conference of the United States, which had proposed the specific language enacted as § 702(1), explained that the courts would still refuse "to decide issues about foreign affairs, military policy and other subjects inappropriate for judicial action."

Id., quoting 1 RECOMMENDATIONS AND REPORTS OF THE ADMINISTRATIVE CONFERENCE 191, 225 (emphasis added).

The court in Bruno concluded that § 702 review of the consular decision to refuse a visa was precluded by the provisions of both §§ 701(a)(1) and 702(1). Bruno, 197 F.3d at 1158. For the same reason, jurisdiction does not exist under the Mandamus Act, 28 U.S.C. § 1361. Id. at 1159. Here, as in Bruno, the Court lacks subject matter jurisdiction, and the Complaint should be dismissed.

2. Patel Does Not Apply Where The Visa Has Been Refused

Plaintiffs cite the Ninth Circuit's decision in Patel, 134 F.3d 929, for the proposition that the Court has jurisdiction. Complaint, p. 10 ¶ 29. There, the Ninth Circuit held that once a visa application is submitted, a consular officer has a duty to act, and may not hold the application in abeyance. Patel, 134 F.3d at 933. Because the consular officer's refusal was not in compliance with the former 22 C.F.R. § 42.81(b), the appellate court concluded that it was not a final decision and that it could order a consular officer to adjudicate a visa application in accordance with the regulations. Id.

Since Patel was decided, the regulations have been modified, and they now explicitly provide that a consular officer may fulfill his or her duty to issue or refuse a visa by refusing a visa under

8 U.S.C. § 1201(g). 22 C.F.R. § 42.81(a); see also Sevensborn, 2007 WL 3342751, at *4. Moreover, here, the consular officer complied with the requirements of 22 C.F.R. § 42.81, and refused the visa under 8 U.S.C. § 1201(g). Accordingly, the Court lacks subject matter jurisdiction, and the Complaint should be dismissed.

3. The Non-Consular Officials Are Not Properly Named

The Ninth Circuit has held that "mandamus is an inappropriate remedy" with regard to non-consular officials, whose duties are discretionary. Patel, 134 F.3d at 933; see also Luo v. Coultice, 178 F. Supp. 2d 1135, 1139-40 (C.D. Cal. 2001) (finding that under Patel, mandamus action to compel action on previously approved I-130 petitions could not lie against the director of the California Service Center). Accordingly, the Court lacks jurisdiction over non-consular officers, and the Complaint against all non-consular officials should be dismissed.

B. VENUE IS IMPROPER

Proper venue in a civil action in which a defendant is an officer of the United States or any agency thereof, acting in his official capacity may be brought in any judicial district in which

> (1) a defendant in the action resides, (2) a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of the property that is the subject of the action is situated, or (3) the plaintiff resides if no real property is involved in the action.

28 U.S.C. § 1391(e) (emphasis added). As explained below, because none of the events at issue took place in this district, and Defendant does not reside here, there is no basis for venue in the Northern District of California.

1. Plaintiffs Do Not Reside In This District

Plaintiffs state in their Complaint that venue is proper in this judicial district because Plaintiff Zhong resides in this District. Complaint, p. 3 ¶ 4. Aliens may not base venue on their residence. Ou v. Chertoff, No. 07-3676 MMC, 2008 WL 686869, at *2 (N.D. Cal. Mar. 12, 2008); see Brunette Machine Works, LTD. v. Kockum Industries, Inc., 406 U.S. 706, 714 (1972) ("suits against aliens are wholly outside the operation of all the federal venue laws"); Galveston, Harrisburg and San Antonio Railway Co. v. Gonzales, 151 U.S. 496 (1894) (diversity); Williams v. United States, 704 F.2d 1222, 1225 (11th Cir. 1983); Fleifel v. Vessa, 503 F. Supp. 129, 130 (W.D. Va. 1980) ("an alien has no residence in the United States for venue purposes"); Prudencio v. Hanselmann, 178 F.

Supp. 887 (D. Minn. 1959); 6A WEST'S FEDERAL PRACTICE MANUAL § 7446.

2. No Acts or Omissions Occurred In This District

Plaintiffs have failed to identify any event that occurred in this district. Plaintiffs filed the petition at issue with the Texas Service Center ("TSC"). Complaint, Exh. E. The TSC is located in Texas, and thus, is not in this District. The TSC approved the petition and faxed it to the consulate in China. Walker Decl., p. 1 ¶ 6. Accordingly, the alleged acts and omissions giving rise to the claim did not occur in this District. Moreover, Plaintiffs ask the Court to review action that occurred in China.

3. The Named Defendants Do Not Reside In This District

Civil actions against officers or employees of the United States, or of any agency thereof, acting in their "official capacity" or "under color of legal authority," may be brought in any district in which the defendant resides. 28 U.S.C. § 1391(e)(1). Generally, for venue purposes, residence of a federal officer is the place where he or she performs his or her official duties. Reuben H. Donnelley Corp. v. FTC, 580 F.2d 264, 267 (7th Cir. 1978).

In the case at hand, Plaintiffs have named six defendants. See Complaint, pp. 4-5 ¶¶ 7-12. The Department of State, Secretary Rice, Ms. Harty, and Mr. Scharfen[4] perform their official duties in the District of Columbia. Mr. Goldberg and Mr. Jacobsen perform their official duties in China. Therefore, Defendants' residence lies in the District of Columbia and China. See, e.g., Franz v. United States, 591 F. Supp. 374, 377 (D.D.C. 1984) (venue for equitable claims asserted against the Attorney General was proper in the District of Columbia). Moreover, there is no government official in this District with authority over the substance of the action.

Transfer is appropriate where it is in the interest of justice. 28 U.S.C. § 1406(a). Here, as explained above, because the Court lacks subject matter jurisdiction, dismissal is appropriate. King v. Russell, 963 F.2d 1301, 1304 (9th Cir. 1992).

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[4]Plaintiffs named Emilio T. Gonzalez as the Director of USCIS; however, Jonathan Scharfen is now the Acting Director of USCIS.

C. ALTERNATIVELY, SUMMARY JUDGMENT SHOULD BE GRANTED IN DEFENDANTS' FAVOR BECAUSE THE VISA REFUSAL WAS IN ACCORDANCE WITH THE LAW

Moreover, contrary to Plaintiffs' contentions, the visa refusal was in accordance with the law. CSPA is clear on its face: the I-824 should have been filed within one year of the visa becoming available to Plaintiff Zhong. 8 U.S.C. § 1153(h)(1)(A). CSPA clearly states that the age-out protection is available "only if the alien has sought to acquire the status of an alien lawfully admitted for permanent residence within one year" of the date her parent's visa became available. Id. Here, the visa was available on October 25, 2002. Walker Decl., p. 1 ¶ 4; Proctor Decl., Exh. A.

Plaintiffs have clearly misread the instructions provided by USCIS on this point. Complaint, p. 6 ¶ 15. They posit that because USCIS will not process an I-824 until such time that an application or petition has been approved, they necessarily had to wait until that date to file the application. Id. In fact, the very instruction sheet on which Plaintiffs rely for this proposition states clearly that the I-824 may be filed "at any time while the application or petition is valid." Complaint, Exh. I (emphasis added).

Plaintiffs also contend that the I-824 filing requirement was a new requirement, imposed in January 2003, "more than one year after Mr. Zhong submitted his adjustment application." Complaint, p. 8 ¶ 20. This argument is without merit. First, the guidance was issued less than one month after Plaintiff Zhong applied to adjust his status on December 23, 2002. Walker Decl., p. 2 ¶ 5. Second, CSPA went into effect on August 6, 2002, well before Plaintiff Zhong applied to adjust his status. CSPA, Pub. L. 107-208, § 8.

VI. CONCLUSION

For the foregoing reasons, Defendants respectfully request the Court to dismiss the Complaint. Alternatively, Defendants request an order granting summary judgment in their favor.

Dated: August 14, 2008

Respectfully submitted,

JOSEPH P. RUSSONIELLO
United States Attorney

/s/
MELANIE L. PROCTOR
Assistant United States Attorney
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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

JIAN MING ZHONG and CHEN ZHONG, Plaintiffs, v. UNITED STATES DEPARTMENT OF STATE, et al., Defendants.	No. C 08-2871 WHA DECLARATION OF GENIZE X. WALKER

DECLARATION OF GENIZE X. WALKER

I, Genize X. Walker, pursuant to 28 U.S.C. 1746, do hereby declare that the following is true and correct to the best of my understanding and belief and in my official capacity I have the delegated authority to declare that:

1. . I am employed by the United States Citizenship and Immigration Services (USCIS) as a Supervisory Adjudications Officer at the Texas Service Center (TSC) in Dallas, Texas ("the Center").
2. This declaration is submitted in the case of Jianming Zhong and Chen Zhong on the docket of the United States District Court for the Northern District of California.
3. The information below is based upon my review of the files, electronic records, personal knowledge, and other information that has become known to me in the course of my official duties.
4. On May 9, 2002, Hwang's Food Inc. (petitioner) filed a Petition for Alien Worker (Form I-140) for the Plaintiff Jianming Zhong (beneficiary), with the former Immigration and Naturalization Service (INS). The INS approved the I-140 on October 25, 2002, under the employment third preference visa category (8 U.S.C. § 1153(b)(3)(A)(i) [skilled worker]).
5. On December 23, 2002, the Plaintiff Jianming Zhong filed an application for adjustment (Form I-485), based upon the petition filed by Hwang's Food Inc. On April 26, 2005, the Plaintiff Jianming Zhong adjusted his status to lawful permanent residence under 8 U.S.C. § 1255 in the employment third preference visa category, with a priority date of April 12, 2001.
6. On June 28, 2005, the Plaintiff Jianming Zhong filed an Application for Action on an Approved Application or Petition (Form I-824), which was approved on August 30, 2005. Upon information and belief, the Center notified the U.S. consulate by faxing copies of the I-824 and I-485, on or about September 7, 2005.

I declare under penalty of perjury that the foregoing is true and correct. Executed this 28th day of July, 2008 at Dallas, Texas.

Genize X. Walker
Supervisory Adjudications Officer
Texas Service Center

UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

JIAN MING ZHONG and CHEN ZHONG, Plaintiffs, v. DEPARTMENT OF STATE et al.	No. 08-cv-02871 DATE: August 13, 2008 DECLARATION OF Chloé Dybdahl

I, Chloé Dybdahl, hereby declare under penalty of perjury:

1. I, Chloé Dybdahl, am employed by the U.S. Department of State as attorney adviser of the legal advisory opinion section of the Visa Office, Bureau of Consular Affairs. In that capacity I am authorized to search the electronic Consular Consolidated Database of the U.S. Department of State, Bureau of Consular Affairs, for replicated records of non-immigrant and immigrant visas issued at U.S. embassies and consular posts overseas. The following declaration is based on my personal knowledge and information acquired in my official capacity in the performance of my official functions.

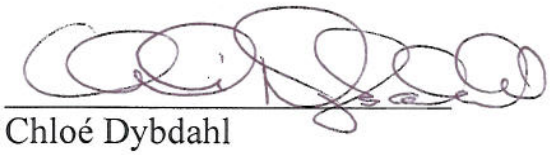
2. The Consular Consolidated Database contains replicated electronic data recording pending non-immigrant and immigrant visa cases, visa applications, visa interviews, and visas issued and refused at U.S. diplomatic and consular posts, including Guangzhou, China.

3. The Consular Consolidated Database reflects the following. The immigrant visa case of Yuqing Wang is assigned the case number of GUZ2006227021. The case includes an additional applicant, Chen Zhong.

4. The Consular Consolidated Database further reflects that Yuqing Wang (DPOB: 02-FEB-1958, China) and Chen Zhong applied for immigrant visas on December 17, 2007. The Consular Consolidated Database shows that on December 19, 2007, a consular officer issued a visa to Yuqing Wang. A consular officer refused the immigrant visa application of Chen Zhong because she was over the age of 21 and consequently not eligible for the requested visa.

I declare under the penalty of perjury, pursuant to 28 U.S.C. § 1746, that the foregoing is true and correct to the best of my knowledge.

Washington, D.C.
August 13, 2008



Chloé Dybdahl

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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

JIAN MING ZHONG and CHEN ZHONG, Plaintiffs, v. UNITED STATES DEPARTMENT OF STATE, et al., Defendants.	No. C 08-2871 WHA DECLARATION OF MELANIE PROCTOR

I, Melanie Proctor, declare and state as follows:

1. I am employed by the United States Attorney's Office, Northern District of California, as an Assistant United States Attorney. My current employment address is 450 Golden Gate Avenue, Box 36055, San Francisco, California, 94102. I am the attorney assigned to the above-captioned matter.

2. On August 14, 2008, I met and conferred with Plaintiff's counsel, Daniel Huang, to ensure that the hearing date of Thursday, October 9, 2008 was agreeable.

3. A true and correct copy of the visa bulletin for October 2002 is attached hereto as Exh. A.

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I declare under penalty of perjury that based upon reasonable inquiry and to my knowledge, information and belief, the foregoing to be true and correct.

Signed this 14th day of August, 2008, in San Francisco, California.

/s/
MELANIE L. PROCTOR

EXHIBIT A

Visa Bulletin

Number 50
Volume VIII
Washington, D.C.

VISA BULLETIN

Priority Dates for Family Based Immigrant Visas

	All Chargeability Areas Except Those Listed	MEXICO	PHILIPPINES
Family			
1st	01MAR99	01NOV91	01DEC89
2A*	15JUL97	01FEB95	15JUL97
2B	01FEB94	22OCT91	01FEB94
3rd	08OCT96	15JUL92	01OCT89
4th	01OCT90	22MAY90	08OCT81

Priority Dates for Employment-Based Immigrant Visas

	All Chargeability Areas Except Those Listed	INDIA	MEXICO	PHILIPPINES
Employment - Based				
1st	C	C	C	C
2nd	C	C	C	C
3rd	C	C	C	C
Other Workers	C	C	C	C
4th	C	C	C	C
Certain Religious Workers	C	C	C	C
5th	C	C	C	C
Targeted Employment Areas/Regional Centers	C	C	C	C

All DV Chargeability Areas Except Those Listed Separately

Region

AFRICA: AF 4,650
ASIA: AS 2,100

EUROPE: EU 8,100
NORTH AMERICA (BAHAMAS): NA 7
OCEANIA: OC 100
SOUTH AMERICA, and the CARIBBEAN: SA 336

Department of State Publication 9514
CA/VO:September 9, 2002
Number 50
Volume VIII

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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

JIAN MING ZHONG and CHEN ZHONG, Plaintiffs, v. UNITED STATES DEPARTMENT OF STATE, et al., Defendants.	No. C 08-2871 WHA PROPOSED ORDER ON DEFENDANTS' MOTION TO DISMISS OR FOR SUMMARY JUDGMENT Date: October 9, 2008 Time: 8:00 a.m. Ctrm: 9, 19th Floor

Plaintiffs brought this action to compel processing of their visa petitions. However, on September 19, 2006, a consular officer refused to issue visas to Plaintiffs. Declaration of Chloe Dybdahl, p. 2 ¶ 4. The Court lacks jurisdiction over consular processing. Ventura-Escamilla v. INS, 647 F.2d 28 (9th Cir. 1981). Accordingly, the Complaint will be dismissed for lack of subject matter jurisdiction. Furthermore, because Plaintiffs are not U.S. citizens, they may not base venue on their residence, and the Complaint will be dismissed for improper venue. Having reached this conclusion, the Court need not address the remainder of Defendants' arguments.

IT IS SO ORDERED. The Clerk shall close the file. The parties shall bear their own costs and fees.

_____
WILLIAM ALSUP
United States District Judge